WONG SWEE CHAN v. TEH AH YONG

[O.C.J. (Ibrahim Manan F.J.) November 5, 1979]

[Malacca — Civil Suit No. 147 of 1974]

Contract — Rescission — Sale agreement for piece of land — No breach by defendant to justify rescission of agreements.

The plaintiff in this case had verbally agreed to purchase from W. K. Tham Co. a three-storeyed shophouse Nos. 29, 29A and 29B which the Company were building for sale on a piece of land at Jalan Kilang which the Company bought from but was still then registered in the name of Pioneer Enterprises Sdn. Bhd. The price was $48,000 of which a total deposit of $18,000 had been paid. In 1967 the premises were almost completed and in 1968 the plaintiff agreed to sell the premises to the defendant. On May 20, 1968, in spite of the refusal and disagreement of W. K. Tham, the plaintiff signed an agreement transferring all his rights, title and interests in the land to the defendant. The defendant was to pay the plaintiff a sum of $18,000 of which $10,000 had been paid and the balance of $8,000 was to be paid at the time when the agreement of sale to be entered into between the Company and the plaintiff had been prepared and ready for execution. So far no such written agreement had been made. Under the said Transfer agreement the plaintiff was to obtain a written approval and consent of the Builders to the sale, otherwise the Transfer would be rendered null and void. Despite the several visits made by the plaintiff to the Company's office he was unable to obtain the said written approval of and consent to the transfer. In a letter of June 30, 1970 the Company asked the plaintiff for the balance of the down-payment of $6,000 then due towards the purchase of the premises in order to facilitate the preparation and finalisation of the agreement by the lawyers. He had not paid the $6,000 to the Company and no agreement had been signed between him and the Company. The defendant had also not paid the balance of $8,000 to the plaintiffs in spite of several demands made by the plaintiff. The defendant said that he was not prepared to pay the said $8,000 until the approval of and consent to the transfer of the premises to the defendant had been obtained and the premises were registered in the defendant's name.

On August 21, 1974 a cheque for the sum of $20,000 was refunded to the defendant by the plaintiff. The plaintiff stated that he no longer intended to transfer his rights, title and interests in the premises to the defendant. On September 5, 1974 the defendant returned the cheque for $20,000 and insisted that the conditions (regarding the approval to the transfer) must first be complied with before he would pay the balance of $8,000. Another correspondence involving the refund and return of the said cheque for $20,000 ensued between the plaintiff and the defendant. On September 18, 1974 the plaintiff's solicitors wrote to the defendant's solicitors telling them that since the defendant had refused to accept the $20,000 that sum had been deposited with them and the defendant would be at liberty to collect it during office hours at any time. The defendant had not collected it. The plaintiff then sought to rescind the contract and claimed for the return of the premises.

Held: the evidence showed that the defendant had performed his part of the Transfer and had not committed any breach of any of its terms which would justify the plaintiff to claim for its rescission.

CIVIL SUIT.

Thara Singh Sidhu for the plaintiff.

Yau Jiok Hua for the defendant.

Ibrahim Manan F.J.: Plaintiff's claim in this action is for:

(a) A declaration that the contract (i.e. the written agreement made between plaintiff and defendant on May 20, 1968 in respect of premises Nos: 29, 29A and 29B Jalan Kilang, Melaka) is no longer binding on plaintiff, alternatively;

(b) Rescission of the said contract;

(c) An order that the defendant do deliver up possession of the said permises to the plaintiff forthwith;

(d) Damages for unlawful occupation thereof;

(e) Further or other relief;

(f) Costs.

Defendant denies plaintiff's claim to which he puts up several defences and asks that it be dismissed with costs.

The admitted paragraphs 1, 2 and 3 of the statement of claim and the evidence adduce show that on April 2, 1966 plaintiff (PW1) verbally agreed to purchase from W.K. Tham Construction Co. a three-storeyed shophouse Nos. 29, 29A and 29B which the company were building for sale on a piece of land at Jalan Kilang which the company bought from but is still registered in the name of Pioneer Enterprises Sendirian Berhad. The price was $48,000 of which a total deposit of $18,000 had been paid. In 1967 the premises were almost completed and sometime in 1968 plaintiff agreed to sell the premises to defendant (DW1). On May 13, 1968 they both went to the Company's office where plaintiff handed to Mr. W.K. Tham (DW2), the proprietor of the Company a letter of the same date (D19) stating that he had transferred the premises to defendant and asked DW2 if he agreed to the transfer. DW2 said that he did not agree. Plaintiff also took with him another letter of the same date (P1) which he asked DW2 to sign but DW2 refused to do so. In spite of DW2's disagreement and refusal plaintiff and defendant on May 20, 1968 went to Messrs. Koh Kim Leng's office where they signed an agreement (P2) by which plaintiff agreed to transfer all his rights, titles and interest in the land (on which the premises stand) to defendant. Defendant was to pay plaintiff a sum of $18,000 of which $10,000 had been paid and the balance of $8,000 was to be paid in accordance with clause (iii) of P2, at the time when the agreement of sale to be entered into between the Company and plaintiff had been prepared and ready for execution. So far no such written agreement has been made.

The proviso in P2 reads as follows:

"(a) The Transferor hereby undertakes to obtain in writing from the Builders the approval and consent of the Builders to the sale to the Transferee of the said land under the like terms and conditions as have already been agreed upon between the Builders and the Transferor for the originally agreed sale of the said land to the Transferor and that failure from any cause whatsoever to obtain such aforesaid approval and consent shall render this Agreement null and void and any moneys paid by the Transferee to the Transferor under the terms of this Agreement shall be forthwith returned to the Transferee by the Transferor.

(b) Should the Builders be prepared to give such consent to and approval of the sale of the said land to the Transferee and should the Transferor then be not willing to transfer all his rights, title and interest in the said land to the Transferee, the Transferor shall then become liable to return to the Transferee forthwith such moneys as would at that time have already been paid by the Transferee to the Transferor together with an equivalent sum by way of liquidated damages.

(c) Similarly should the Transferee under the conditions stated in part (b) above be then not willing to accept the transfer of all the Transferor's rights, title and interest in the said land, and to purchase the said land under the terms

and conditions as stated above the Transferee shall have no claim whatsoever on such moneys as would at that time have already been paid by the Transferee to the Transferor which moneys shall be rightfully retained by the Transferor by way of liquidated damages."

The keys to the premises were handed by the Company to plaintiff vide Company's letter dated May 13, 1968 (P15) and on July 5, 1968 plaintiff let defendant into possession of the premises and defendant has been in possession thereof eversince.

In pursuance of proviso (a) in P2 plaintiff went to the Company's office several times and saw either DW2 or his clerk to get the written approval of and consent to the transfer but the Company refused to give it. Defendant also went to the Company's office on numerous occasions to get such approval and consent as a result of which he received a letter from the Company dated January 10, 1969 (D11) asking him to call at the Company's office on January 17, 1969 to discuss the matter and finalise the agreement. He went to the office on the appointed date and DW2 told him that he would inform him when the agreement was to be signed. In a letter dated June 30, 1970 (D13) the Company asked him for the balance of the down-payment of $6,000 then due towards the purchase of the premises in order to facilitate the preparation and finalisation of the agreement by the lawyers. He has not paid the $6,000 to the Company and no agreement has so far been signed between him and the Company.

Defendant has also not paid the balance of $8,000 to plaintiff though plaintiff must have demanded for it verbally on several occasions and on September 8, 1972 plaintiff's solicitors sent a letter (P3) to defendant demanding payment of that sum failing which legal action would be taken against him. In reply to P3 defendant's solicitors sent letter dated September 18, 1972 (P4) to plaintiff's solicitors in which they asked that they be shown the agreement plaintiff made with the Company and their approval of and consent to the transfer of the premises to defendant. They also said that they were prepared to send $8,000 on the undertaking that plaintiff's solicitors would not part with the said $8,000 or any part thereof until the premises were registered in defendant's name.

On August 21, 1974 plaintiff's solicitors sent a letter (P5) to the defendant telling him that he no longer intended to transfer his rights, title and interest in the premises to him and forwarding a cheque for $20,000 being the refund of the deposit and damages under proviso (b) in P2. Defendant's solicitors replied to P5 in letter dated September 5, 1974 (P6) in which they insisted that the conditions mentioned in their previous letter (P4) must first be complied with before they would pay the balance of $8,000 and with which they returned the cheque for $20,000 alleging that plaintiff had no right to take such a course of action whatsoever. On September 9, 1974 plaintiff's solicitors again wrote to defendant's solicitors (P16) in which plaintiff repeated his intention to repudiate and thereby repudiated P2 under proviso (b) therein and again forwarding the cheque for $20,000. On the same date defendant's solicitors wrote a letter (P17) returning the cheque to plaintiff's solicitors for reasons stated earlier. On September 18, 1974 plaintiff's solicitors wrote to defendant's solicitors (P18) telling them that since defendant had refused to accept the $20,000 that sum had been deposited with them and defendant would be at liberty to collect it at any time during office hours. Defendant has not collected it.

Plaintiff has made use of the $10,000 he received from defendant to buy a piece of land in Kampong Tujuh where he has carried on his furniture making business. Defendant, on the other hand, has built up his motor cycle sale and repair business at 29 and let out 29A at $140 per month from 1972. He has himself been residing at 29B. He has been paying the assessments and other fees in respect of the premises and for practical purposes the Company have treated him as purchaser of the premises as can been seen from D11, D13 and other letters sent by the Company to him (D12 dated July 16, 1969, D20 dated August 30, 1978 and D21 dated December 9, 1978). There is, however, a letter sent by plaintiff's solicitors to the Company dated September 9, 1977 (P7) asking them if they were prepared to give in writing their approval of and consent to the transfer. The Company replied to that letter on September 12, 1977 (P8) telling them that they were not prepared to do so.

Before hearing started plaintiff sought to amend the Statement of Claim but on objection from defendant who asked for costs of the adjournment which would follow the proposed amendment plaintiff decided not to proceed with it. After all evidence had been adduced and before submission plaintiff again sought to amend the Statement of Claim in respect of paragraphs 4 and 6(d) thereof. The court reserved decision on the proposed amendment and proceeded to hear submissions. Both counsel submitted written submissions which are marked X and Y respectively.

The object of the proposed amendment to paragraph 4 of the Statement of Claim is apparently to enable the plaintiff to invoke proviso (a) in P2 and much has been said in plaintiff's counsel's written submission on it. The gist of his contention is that the refusal of the Company to give written approval of and consent to the transfer is a "failure from any cause whatsoever" which "shall render the agreement null and void" and therefore P2 is no longer binding on plaintiff. The law relating to the proposed amendment in this case is clearly stated in *Mallal's* Supreme Court Practice page 345:

"*Amendment after Close of Case but before Judgment.* Unless there is very good ground and strong justification for so doing, the court should be reluctant to grant amendments of the pleadings after the close of the case but before judgment, even though it has been indicated in the course of the hearing that some amendment might be asked for. Such an amendment may be allowed: (1) where the matter involved has been raised in the course of the trial and counsel has addressed the court on it, since it will be merely incorporating in the pleadings that which has emerged in the course of the case as an issue between the parties; (ii) where the fact the subject of the amendment has been referred to by counsel in opening and evidence about it has been given, since there has been sufficient indication in the course of the trial and in the evidence that it is a matter in controversy and the amendment will enable the court to arrive at the view, if it thinks fit, that what is pleaded is a correct interpretation of the facts."

As there is no evidence to establish that plaintiff had at any time repudiated P2 under proviso (a) therein and no such issue has therefore arisen between the parties I would decide not to allow the amendment.

It is quite obvious that plaintiff had really wanted to transfer all his rights, title and interest in the premises to defendant and that defendant had wanted to pay plaintiff in full when they made P2. Plaintiff needed the money while defendant needed the premises. It is equally obvious that in spite of the Company's refusal to give written approval and consent both plaintiff and defendant and most probably also the Company expected that such approval and consent would be given. Unfortunately the Company have not been able to give their written approval and consent, apparently because the land on which the premises stand is still registered in the name of Pioneer Enterprises Sendirian Berhad and that no written agreement can yet be made between the Company and plaintiff in respect of the premises. It was not until August 21, 1974 when plaintiff's solicitors sent P5 to defendant that plaintiff expressed his intention to repudiate P2, but even then the purported repudiation was made under proviso (b) and not under proviso (a), and as such intention was reiterated in P7 dated September 9, 1977 it cannot be said, as plaintiff sought to allege in the proposed amendment to paragraph 4, to have been made inadvertently. Furthermore, it would be a matter of mere speculation as to what defendant's reaction would be had plaintiff repudiated P2 under proviso (a) and it is significant that it was only on September 12, 1977 when the Company replied in P8 to P7 dated September 9, 1977 that an acknowledgment in writing was obtained from the Company that they were not prepared to give their written approval of and consent to the transfer of the premises from plaintiff to defendant.

I would also decide not to allow the proposed amendment to paragraph 6(d) as I consider it unnecessary, it being only a clarification of the basis on which damages are to be assessed should plaintiff succeed in his claim.

In view of what is averred in the Statement of Claim and the evidence adduced prayer (a), which is for a declaration that P2 is no longer binding on plaintiff, must necessarily be based on the purported repudiation of P2 under proviso (b). Defendant denies that plaintiff has a right to do so and I agree with him. The issue depends entirely upon the interpretation of that proviso. The approval and consent referred to therein is that which plaintiff has undertaken to obtain under proviso (a) and under proviso (b) plaintiff can only refuse or be unwilling to transfer his rights, title and interest to defendant in the event that the Company are prepared to give their written approval and consent to the transfer. As no such approval and consent has been obtained P5 and P7 have no legal effect and defendant has rightfully returned plaintiff's cheque for $20,000. P2 being still in existence plaintiff is not entitled to prayer (a). It is true that a further condition has been added in defendant's letters which he has repeated in his evidence that he is not paying the balance of $8,000 unless and until the transfer is registered in his name, but in my view that cannot be considered as fatal to defendant's case since the written approval and consent of the Company to the transfer itself has not been obtained.

As to the alternative prayer (b) which is for rescission of P2 I also agree with defendant that plaintiff is not entitled to it. As stated in 9 *Halsbury's* Laws of England 4th Edition at page 369 under paragraph 535:

"Rescission is the name given to a process whereby an existing contract is brought to an end and the effects of its existence are cancelled or terminated.... Though in some circumstances it is possible to bring an action for rescission, rescission always involves an act of a party (or of both parties) which if rightly exercised, may be relied upon as a defence in any subsequent action."

and at page 371 under paragraph 540:

"In considering whether there has been defective performance such that the innocent party may treat the contract as discharged, it must be ascertained whether, on the proper construction of the contract, the performance of the promise of one party is a condition precedent to the liability of the other to perform his part or is independent of it...."

The evidence shows that defendant has performed his part of P2 and has not committed any breach of any of its terms which would justify plaintiff to claim for its rescission. As for the demand for $8,000 defendant was right not to pay until a written approval and consent which plaintiff has undertaken to obtain in writing from the Company has been obtained. It is true that having been put into possession of the premises defendant has taken advantage of P2, but as he is also ready and willing to fulfill his obligation to pay the $8,000 to plaintiff provided that the condition precedent to it is fulfilled by plaintiff it cannot be said that he is approbating and reprobating it.

Subsequent prayers are incidental to and dependent on prayers (a) and (b) and as he has not succeeded in those prayers I would dismiss plaintiff's claim with costs.

Order accordingly.

Solicitors: *Goh Soot Hwang & Co.; Yau Jiok Hua.*

THE "FUJI HOSHI MARU"; UNITED ASIAN BANK BHD. v. M/V. FUJI HOSHI MARU, OWNERS & ORS. INTERESTED

[O.C.J. (Vohrah J.) March 18, 1980]
[Kuala Lumpur — Admiralty Suit No. 2085 of 1978]

Practice and Procedure — Statement of claim — Application to strike out — Whether action vexatious and frivolous — Rules of the Supreme Court, 1957, O. 25 r. 4.

Shipping Law — Bill of lading — Document of Title — Claim by indorsees of bill of lading for non-delivery of goods.

Arbitration — Stay of proceedings — Charterparty with arbitration clause — Claim for non-delivery by indorsees of bill of lading — Whether plaintiffs had locus standi — Bill of lading did not incorporate arbitration clause of charterparty.

Jurisdiction — Stay of proceedings — Whether court had jurisdiction to try suit — Courts of Judicature Act, 1964, ss. 23 & 24 — U.K. Administration of Justice Act 1956.

The plaintiffs in this case, indorsees of a bill of lading for oil shipped on board the defendants' vessel, Fuji Hoshi Maru, for carriage from Butterworth to Penang issued a writ against the defendants for non-delivery of their oil palm cargo. The plaintiffs claimed that the oil palm worth M$980,832.14 was wrongfully delivered to a person not in possession of the bill of lading. At the instance of the plaintiff, the said vessel was arrested at Port Klang.

The defendants sought for a stay of the proceedings. They claimed that the charterparty provided for reference of a dispute to arbitration in London, and questioned the *locus standi* of the plaintiffs to bring the action. The defendants